

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

JUL 14 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
Amendment of § 73.202(b) of the Rules,) MM Docket No. 95-49
Table of Allotments, FM Broadcast Stations) RM-8858
(LLANO AND MARBLE FALLS, TEXAS)) 8558

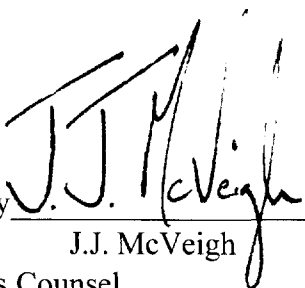
To: The Chief, Allocations Branch,
Mass Media Bureau

OPPOSITION TO MOTION FOR STAY

Maxagrid Broadcasting Corporation, the licensee of station KBAE(FM), Channel 285C3, Marble Falls, Texas, opposes Roy E. Henderson's and Tichenor License Corporation's Motion to stay the Report and Order, 62 Fed. Reg. 31008 (June 6, 1997). The Movants have not satisfied even one element of the rigorous test for such *extraordinary* relief. See Exhibit A.

Respectfully submitted,

MAXAGRID BROADCASTING CORPORATION

By 
J.J. McVeigh
Its Counsel

John J. McVeigh, Attorney at Law
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Date: July 14, 1997

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EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN GARBER AND ASSOCIATES,)
 Petitioner,)
)
 v.) No. 85-1784
)
FEDERAL COMMUNICATIONS COMMISSION)
and UNITED STATES OF AMERICA,)
 Respondents,)
)
MID-STATE MEDIA, INC.,)
 Intervenor.)

RESPONDENT'S OPPOSITION TO
EMERGENCY MOTION FOR STAY

Respondent Federal Communications Commission hereby opposes the Emergency Motion for Stay filed by petitioner John Garber and Associates. Garber has requested the Court to stay the effectiveness of the Commission's March 25, 1986, public notice 1/ of the opening of a 30-day period between April 7, 1986, and May 7, 1986, for filing applications for a new FM radio allocation on Channel 255A at Upper Arlington, Ohio until the Court has decided the merits of Garber's argument that the Commission should have allocated this channel to Lancaster, Ohio, instead of Upper Arlington. See First Report and Order, Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments, 100 FCC 2d 1332, on reconsideration, 59 Rad. Reg. 2d (P&F) 679 (1985). 2/

1/ Window Notice for the Filing of FM Broadcast Applications, Report No. W-7, March 25, 1986 (Window Notice).

2/ The Commission denied Garber's Emergency Motion for Stay seeking the same relief on April 4, 1986. Window Notice for the Filing of FM Broadcast Applications, Report No. W-7, FCC 86-148, released April 8, 1986. A copy of the Commission's order is attached to this pleading.

Garber has not satisfied this Court's well established requirements for the issuance of a stay. Specifically, Garber is unlikely to succeed on the merits. The Commission allocated Channel 255A to Upper Arlington (1980 population 35,648) after a comprehensive omnibus notice and comment rule making proceeding. Upper Arlington has no local radio service at the present time and the preference for first local service has traditionally been given great weight in the allocation of FM channels. In addition, Garber has not shown that it will suffer any irreparable harm if the Court denies the request for a stay, or that the issuance of a stay will not harm other parties who are interested in filing applications for Channel 255A, or that a stay would be in the public interest.

BACKGROUND

The Commission allocated 689 new FM radio channels to various communities throughout the United States in the Report and Order under review. The Commission allocated Channel 255A, the subject of Garber's petition for review and the instant motion for stay, to Upper Arlington to provide that community with its first local radio service. 100 FCC 2d at 1351; 59 Rad. Reg. 2d (P&F) at 697. Garber sought the assignment of this channel to Lancaster, Ohio (1980 population 34,953), but this proposal was properly rejected by the Commission. Specifically, the Commission had spelled out five considerations it would follow in determining where the new FM radio channels at

issue in this proceeding would be allocated, 3/ and Garber's proposal did not purport to meet any of the Commission's criteria. On March 25, 1986, the Commission invited the filing of applications between April 7, 1986, and May 7, 1986, for vacant FM allotments in a number of communities, including the one for Channel 255A in Upper Arlington. Window Notice, supra. Selection of a permittee from a group of acceptable applicants for a particular channel will be by the comparative hearing process. Id. See Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965). This process will take a minimum of several months, assuming only one acceptable application is filed. If a comparative hearing is held, the process could take much longer.

ARGUMENT

Garber has not satisfied the familiar tests for a stay: irreparable injury, likelihood of success on the merits, harm to others, and the public interest. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74; (D.C. Cir. 1985); Washington Metropolitan Area Transit Association v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

3/ I.e., first or second aural service, first local service, first full-time local service, minority service, and public radio service. Notice of Proposed Rule Making, Increasing the Availability of FM Broadcast Assignments, 49 Fed. Reg. 11214, 11216, published March 26, 1984. See First Report and Order, supra, 100 FCC 2d at 1333-1334. Lancaster already has two radio stations licensed to it.

This Court has recently emphasized that a party seeking injunctive relief must satisfactorily demonstrate the imminence and substantiality of irreparable injury in the absence of a stay. See Reynolds Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir. 1985); Wisconsin Gas Co. v. FERC, supra, 758 F.2d at 674. As the Court has noted, "the injury must be both certain and great; it must be actual and not theoretical." Wisconsin Gas Co. v. FERC, supra, 758 F.2d at 674. Moreover, it is well settled that

[t]he key word in this consideration is irreparable. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Virginia Petroleum Jobbers Association v. FPC, supra, 259 F.2d at 925 (emphasis in original).

Garber argues that it will suffer irreparable harm in the absence of a stay because it will not be able to persuade the Court to give it the relief it seeks in its petition for review in view of what Garber fears will be the Court's sympathy for the applicants for Upper Arlington. The argument borders on the frivolous.

Even after the application process is completed, it is clear that "other corrective relief will be available" 4/ should Garber succeed in its petition for judicial review. The Communications Act, the Commission and this Court have all recognized that license grants made during the pendency of

4/ Virginia Petroleum Jobbers Association v. FPC, supra, 259 F.2d at 925.

relevant litigation are subject to that litigation and may be undone if the basis of the grant is reversed as a result of the outcome of the litigation. Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 736 (D.C. Cir. 1976).

In other words, if the Commission's decision to allocate Channel 255A to Upper Arlington were to be reversed on appeal, whatever action was taken in reliance on the orders could be undone. This Court has recognized the obvious proposition that it must be presumed that an agency will carry out the directions of a reviewing court. See Seacoast Anti-Pollution League v. NRC, 690 F.2d 1025, 1033 (D.C. Cir. 1982); Porter County Chapter v. NRC, 606 F.2d 1363, 1370 (D.C. Cir. 1979); Virginia Petroleum Jobbers, supra, 259 F.2d at 926. See also 47 U.S.C. § 402(h). Moreover, the FCC has made clear that parties who act in reliance on agency decisions before they become final and beyond reconsideration by the Commission or review by the courts, do so at the risk that they may have to reverse that action. See Teleprompter Corp., 50 Rad. Reg. 2d (P&F) 125, 127 (CATV Bur. 1981); Improvement Leasing Co., 73 FCC 2d 676, 684 (1979), aff'd sub nom. WATCH v. FCC, 655 F.2d 1264 (D.C. Cir. 1981). See also Virginia Petroleum Jobbers, supra, 259 F.2d at 927.

There is no basis whatsoever to believe that in the unlikely event that Garber should succeed on the merits of its appeal, either the Court or the Commission would be unable to provide it with complete relief -- including vacating a license grant if it had been made on the basis of a flawed channel assignment. See Alianza Federal de Mercedes v. FCC, supra.

Garber's position appears to contemplate a stay of a Commission license grant, or action that might lead to a license grant, whenever a losing competitor for a grant or a disqualified applicant seeks review of the agency action. If that were the case, stays of agency licensing decisions would become routine, rather than the extraordinary remedy that a stay is meant to be. See Middlewest Motor Freight Bureau v. United States, 433 F.2d 212, 242 (8th Cir. 1970), cert. denied, 402 U.S. 999 (1971).

In short, as this Court has held, where the agency has the power to take full remedial action, and where the Court has the power to order the agency to take that action, the moving party cannot establish irreparable harm. Reynolds Metals Co. v. FERC, supra, 777 F.2d at 763.

Turning to the second requirement for a stay, Garber has not demonstrated a substantial likelihood of success on the merits of its appeal. The Commission specified five criteria for determining which communities in the United States are entitled to new FM channels. See n. 3, supra. In doing so, the Commission reasonably exercised its broad discretion in channel allocation matters. See, e.g., Coastal Bend Television Co. v. FCC, 234 F.2d 686 (D.C. Cir. 1956); Logansport Broadcasting Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954). Garber's proposal for Lancaster, Ohio did not even purport to demonstrate that Lancaster meets any of the criteria for a new channel. Upper Arlington, on the other hand, did meet at least two of the criteria; therefore, the Commission properly rejected Garber's proposal. The likelihood that Garber can persuade this Court that the Commission erred in favoring the Upper Arlington

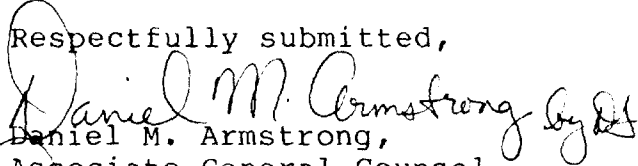
proposal over Garber's is remote at best and certainly far short of the threshold showing needed to justify the extraordinary relief of a stay.

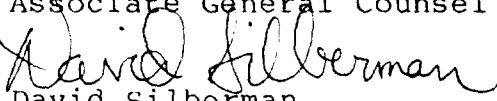
Finally, potential applicants for Upper Arlington and the public will suffer if the Commission is prevented from going forward with the acceptance and processing of applications. The Commission should not be delayed or prevented from initiating efforts to bring a first local service to Upper Arlington as expeditiously as possible.

CONCLUSION

For the foregoing reasons, the emergency motion for stay should be denied.

Respectfully submitted,


Daniel M. Armstrong,
Associate General Counsel,


David Silberman,
Counsel.

Federal Communications Commission
Washington, D.C. 20554
(202) 632-7112

April 14, 1986

MM
FCC 86-148
36569

ORDER

Released: April 8, 1986

1/ Upper Arlington (1980 population 35,648) has no local radio service at the present time. Garber had requested in Docket 84-231 that Channel 255A be assigned to Lancaster, Ohio (1980 population 34,953), which already has two radio stations licensed to it. See 59 RR 2d at 697.

- (1) a likelihood of prevailing on the merits;
- (2) that he would suffer irreparable injury from denial of the relief requested;
- (3) that issuance of the stay would not harm other interested parties; and
- (4) that grant of the stay is in the public interest.

See also Reynolds Metals Company v. FERC, 777 F.2d 760 (D.C. Cir. 1985); Wisconsin Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1985); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1971); Pocahontas Cable TV, Inc., 64 FCC 2d 698 (1977).

3. Garber's motion is without merit and will be denied. Although Garber asserts that, on its face, its appellate brief establishes a likelihood of prevailing on the merits, ^{2/} such assertion is hardly adequate. "[S]ubstantial indication of probable success," not a mere self-serving statement, is required. Virginia Petroleum Jobbers, *supra*, at 925. In any event, we are not persuaded by the arguments Garber makes in its brief. Nor do we believe that the reviewing court will find merit to these arguments.

4. Garber next posits that applicants for the contested channel who file for Upper Arlington during the window will be irreparably injured if the Court of Appeals overturns our allocation of the channel. Garber, however, makes no claim of irreparable harm to itself. That being the case, the motion is fatally defective. See Wisconsin Gas Co., *supra*, at 674.

5. With respect to element (3), *i.e.*, harm to other parties, Garber makes no showing that issuance of a stay would leave other parties unharmed--nor can it. It is obvious that if a stay were granted, the opportunity to file applications for Upper Arlington could be delayed for a considerable amount of time. To require potential applicants to wait indefinitely would be unfair to those who are interested in initiating a first local service to Upper Arlington. As to the fourth and final element, *i.e.*, the public interest, Garber argues that the pendency of its appeal dictates that the public interest would be served by granting a stay. The mere fact that Garber's appeal is pending, however, fails *per se* to warrant closing the filing window and holding up the processing of any applications filed for Upper Arlington. To do so would thwart "orderly procedure... crucial..." to the furtherance of the public interest. Virginia Petroleum Jobbers, *supra*, at 927.

6. It is thus clear that Garber has failed to make the showing sufficient to satisfy any of the four criteria required for a stay. Wisconsin Gas Co., *supra*, at 672.

^{2/} A copy of Garber's brief is attached to the motion.

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7. Accordingly, IT IS ORDERED, THAT the "Emergency Motion For Stay" filed by John Garber and Associates IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

CERTIFICATE OF SERVICE

I, Patricia H. Yansaneh, hereby certify that the foregoing "Respondent's Opposition To Emergency Motion For Stay" was served this 14th day of April, 1986, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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CERTIFICATE OF SERVICE

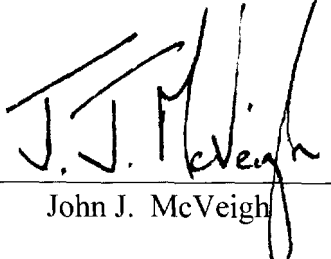
I hereby certify that I have, this Fourteenth day of July, 1997, sent copies of the foregoing **OPPOSITION TO MOTION FOR STAY** by first class United States Mail, postage prepaid, to:

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